No. 8105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

RICHARD S. MCCREERY,

Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This appeal involves a deficiency in income tax for the year 1930. The undisputed facts may be summarized as follows:

Burlingame Investment Company was organized by respondent under the laws of California in 1924. (R. 28.) Certain stocks and bonds then owned by respondent were transferred to Burlingame Investment Company and in exchange therefor all of the stock of the Company was issued to respondent with the exception of two qualifying shares which were issued to respondent's wife and son. (R. 28.) Continuously thereafter down to and including the year 1930 the Company was engaged in the business of owning, buying and selling securities; at one time it owned

one substantial piece of real estate. Respondent was president of the Company continuously since its organization and the sole person in charge of its active affairs. (R. 50.)

At all times since its organization, the Burlingame Investment Company kept separate books of account consisting of a ledger, cash book and journal wherein there was currently recorded all items of income, dividends, interest, sales, purchases and financial transactions appertaining to the Company. Similarly, respondent kept separate books of account for his own affairs. (R. 52, 53.) The Company at all times maintained a separate bank account. (R. 62.)

On and prior to December 30, 1930, respondent owned certain shares of the capital stock of Standard Oil Company of California, Transamerica Corporation and Caterpillar Tractor Company. (R. 28, 29.) On December 30, 1930, respondent unqualifiedly sold these shares of stock to Burlingame Investment Company at the closing market quotations shown upon the San Francisco Stock Exchange on that date. (R. 29.) Upon the sale of these shares, respondent immediately endorsed the certificates therefor and caused such certificates to be delivered to the respective transfer agents for the three corporations with instructions to have new certificates issued in the name of Burlingame Investment Company. Within a few days thereafter, the Company received the certificates for the stocks which it had purchased, all dated December 30, 1930, and issued in its name. Appropriate book entries were made upon respondent's individual

books of account and upon the books of the Company, as of December 31, 1930, showing the sale and charge therefor, on the one hand, and the purchase and liability for payment of the purchase price, on the other. (R. 29, 30.) At all times respondent carried a personal account with the corporation, which reflected the daily status of the account between him and the corporation and which recorded charges and credits between them. Immediately prior to the sale by respondent to the corporation on December 30, 1930, of the said shares of stock, the status of the personal account between respondent and the corporation showed that respondent was indebted to the corporation in the sum of $38,000.00. After respondent received credit for $54,200.00 representing the sale price of the stocks, his personal account, instead of showing a debit balance of $38,000.00, showed a credit balance of $16,200.00. Immediately following the foregoing entries in the personal account, respondent was credited on the same date with the sum of $40,000.00, representing dividend No. 6 declared on that date by the corporation. As a matter of fact, all dividends declared from time to time by the corporation on its outstanding shares were paid to respondent, not in cash, but by credit to his personal account; but such dividends were returned by respondent, for income tax purposes, as of the date of declaration and credit. Respondent received no cash from the corporation at the time of sale by him of the stocks, but credit was given to respondent for the sale price on both the books of account of respondent and Burlingame Investment Company in the manner heretofore indi-

cated. The corporation was at all times possessed of marketable securities several times greater than the amount which it owed to respondent. (R. 31.)

The Transamerica shares were continuously owned and held by Burlingame Investment Company until 1932 when they were sold by the Company through a broker on the open market. The Company received the net proceeds of the sale and retained them solely for itself. The shares of stock of Standard Oil Company of California and Caterpillar Tractor Company were retained by Burlingame Investment Company and were still held and owned by it at the date of trial. (R. 51, 52.) All dividends paid on the stocks were received by Burlingame Investment Company and retained by it for its own purposes. (R. 52.) At no time was there any agreement whereby respondent had the right to repurchase or reacquire any of the foregoing shares of stock or any interest therein, nor did he reacquire any of said shares. (R. 52.)

In his individual income tax return for the calendar year 1930, respondent claimed losses upon the sale of the foregoing shares of stock to Burlingame Investment Company. The Commissioner disallowed the losses claimed by respondent upon the ground that the sale was a "colorable" transaction and therefore invalid, and that even if held to be valid, no deductible loss could result because the sale was ineffectual to remove the securities from the dominion and control of respondent. (R. 31, 32.) Accordingly, the Commissioner determined a deficiency in income tax of $7162.98 for the year 1930. (R. 27.) The Board

of Tax Appeals held that the claimed losses were deductible under the statute and expunged the deficiency attributable to the disallowance of such loss. The parties filed recomputations showing a deficiency of $1655.11 and the Board of Tax Appeals ordered and decided that the correct deficiency due from respondent for the year 1930 was $1655.11. (R. 34.) This latter amount is not in dispute.

The Commissioner is appealing from the decision of the Board.

QUESTION INVOLVED.

The sole question involved herein is whether the sale of securities by respondent during the year 1930 to a corporation of which he was the owner of all of the shares of stock entitles respondent to deduct, as a loss in his income tax return for that year, the difference between the cost of the securities to respondent and the price at which they were sold to such corporation.

STATUTE INVOLVED.

The applicable statute is Section 23, subdivision (e) of the Revenue Act of 1928, which is entitled "Deductions from Gross Income" and which provides that

> "In computing net income, there shall be allowed as deductions:
>
> * * * * * * *
>
> (e) Losses by individuals. In the case of an individual, losses sustained during the taxable

year and not compensated for by insurance or otherwise.

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft."
Revenue Act of 1928, c. 852, 45 Stat. 791.

ARGUMENT.

No principle of law is more firmly established than the rule that a corporation and its stockholders are separate and distinct entities. True, a corporation is frequently referred to as a fiction. "But it leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members." (*Klein v. Board of Supervisors,* 282 U. S. 19, 24.) Nor is the corporate entity to be disregarded because stock ownership is concentrated in the hands of one person. As stated in a leading California case, *Erkenbrecher v. Grant,* 187 Cal. 7, 11:

> "* * * the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons, does not and should not destroy its separate existence. * * *"

That concentration of stock ownership in one person does not justify disregard of the separate entity of corporation and stockholder has been consistently recognized by the Supreme Court in tax cases.

Burnet v. Commonwealth Improvement Co., 287 U. S. 415;

Dalton v. Bowers, 287 U. S. 404;

Burnet v. Clark, 287 U. S. 410.

Since it must be accepted as an established premise that a corporation is, in the eyes of the law, an entity separate and distinct from that of its sole stockholder, respondent must prevail in this action unless there is some special rule applicable to the deduction of losses resulting from sales by a sole stockholder to the corporation or unless peculiar facts are presented in this case which take the case out of the general rule.

That there is no exception to the general rule in cases where sales are made by an individual to a corporation in which he is the sole stockholder has been definitely settled by decisions of the United States Supreme Court, and Federal Appellate Courts, including this Court.

The exact converse of the situation here presented arose in *Burnet v. Commonwealth Improvement Co.*, 287 U. S. 415. The facts in that case were as follows: One Widener organized the respondent corporation and transferred certain securities to it, re-

ceiving in exchange all of its stock. One of his purposes in organizing the corporation and transferring the securities to it was to avoid multiple inheritance taxes. Upon his death all of the stock in respondent corporation passed to the trustees under his will. Thereafter, the corporation transferred to the trustees certain of the securities that Widener had originally delivered to the corporation. If the corporation and the trustees were to be regarded as separate entities, a taxable gain resulted to the corporation from this transfer but the corporation maintained that it was merely the agent or instrumentality of the trustees of Widener's estate in administering their trust and that, practically considered, the trustees and the corporation were the same entity.

The Supreme Court held, however, that a taxable gain resulted, stating at page 419:

> "Counsel for respondent concede that ordinarily a corporation and its stockholders are separate entities, whether the shares are divided among many or are owned by one. Consequently, they make no effort to support any general rule under which a corporation and its single stockholder have such identity of interest that transactions between them must be disregarded for tax purposes. They submit, however, the peculiar facts here disclosed suffice to show there was really no income, nothing properly taxable as such. They refer to Southern Pacific Co. v. Lowe, 247 U. S. 330, 62 L. ed. 1142, 38 S. Ct. 540, and Gulf Oil Corp. v. Lewellyn, 248 U. S. 71, 63 L.

ed. 133, 39 S. Ct. 35, not as controlling but as instances where the court looked through mere form and regarded substance.

While unusual cases may require disregard of corporate form, we think the record here fails to disclose any circumstances sufficient to support the petitioner's claim. Certainly the Improvement Company and the Estate were separate and distinct entities; the former was avowedly utilized to bring about a change in ownership beneficial to the latter. *For years they were recognized and treated as different things and taxed accordingly upon separate returns.* The situation is not materially different from the not infrequent one where a corporation is controlled by a single stockholder." (Italics supplied.)

The *Commonwealth Improvement* case, while involving a sale by the corporation to its sole stockholder at a profit, rather than by the stockholder to the corporation at a loss, definitely lays down the rule to be applied to the instant case—namely, that gain or loss is to be recognized in transactions between corporations and their sole stockholders.

In *Jones v. Helvering,* 71 Fed. (2d) 214, the Court of Appeals of the District of Columbia, considered a situation identical with that presented in the instant case, except that there were four stockholders instead of one. Liberty bonds owned by the four stockholders were sold to the corporation at the prevailing market price, which was less than the price which the stockholders had paid for the bonds. The purchase price was represented by a credit to each

of the stockholders on the books of account of the corporation. In holding that the transaction was effective to establish deductible losses, for income tax purposes, as to the four stockholders, the Court stated at pages 216 and 217:

> "We fully agree with the Board that the taxpayers had the power to cause the corporation to take the bonds at such price as taxpayers might impose, and, if taxpayers had used this power to make the sale at a fictitious price and thereby create, or attempt to create, a fictitious loss for deduction purposes, we should have an altogether different case and one we should not hesitate to brand as fraudulent in fact, but here, admittedly, the price at which the bonds were sold to the corporation was the market price at the time of sale, and, if the sale was otherwise bona fide, the claimed amount of loss is uncontested.
>
> That brings us back to the single query whether the possession of the power to do the thing the Board denounces, that is to say, the ability through stock ownership to control the corporate action, is sufficient to make a sale otherwise unobjectionable subject to be treated as a nullity for tax purposes. The only argument that can be urged in the affirmative is that it is against public policy to allow a taxpayer to incorporate his business in such a way as through manipulation or transfers between himself and it he can place the one or the other beyond the reach of the taxing statutes, and there is great force to the argument. But, so far as we know, in the cases where the element of fraud in fact is lacking, it has been the invariable holding that a taxpayer may resort to any legal methods available to him

to diminish the amount of his tax liability. Bullen v. State of Wisconsin, 240 U. S. 625, 630, 36 S. Ct. 473, 60 L. ed. 830. In Iowa Bridge Co. v. Commissioner, supra, at page 781 of 39 F. (2d) Judge Gardner, speaking for the Court of Appeals in the Eighth Circuit, said: 'In fact, it is held that even though the transaction is a device to avoid the burden of taxation, or to lessen that burden, it is not for that reason alone illegal'. See also United States v. Isham, 17 Wall. 496, 506, 21 L. Ed. 728. * * * In December, 1921, the corporation bought the bonds and paid for them by crediting the account of each taxpayer in the amount he was entitled to receive, and thereafter it continued to hold the bonds as absolute owner. That the result of this was to enable taxpayers to claim a deductible loss in their income and at the same time, by reason of control of the corporation, to retain an indirect interest in the bonds is undoubtedly true, but it is for the legislature, and not the courts to find a way of taxing such a transaction. As the matter now stands, inequitable as it may appear, there is no statute condemning it. The Supreme Court has been at great pains to point out time and again that a corporation is a legal entity and as such wholly different and distinct from its shareholders."

In view of the decision of the Supreme Court in the *Commonwealth Improvement* case, supra, and the decision of the Court of Appeals of the District of Columbia in the *Jones* case, the holding of this Court in *Commissioner v. Eldridge,* 79 Fed. (2d) 629, was inevitable. That decision, as petitioner frankly ad-

mits on page 26 of its brief in this case "was on facts hardly distinguishable from those in the instant case". All of the stock in the vendee corporation was community property of the two respondents. Respondents transferred securities to the corporation receiving no cash therefor, but being credited on the books of the corporation with the market value of the securities. This Court, in holding that the transfers to the corporation resulted in a deductible loss, stated:

> "Generally, in tax cases, as in other cases, a corporation and its stockholders are to be treated as separate entities. Burnet v. Clark, 287 U. S. 410, 415; Burnet v. Commonwealth Improvement Co., 287 U. S. 415, 420; Dalton v. Bowers, 287 U. S. 404, 410; Klein v. Board of Supervisors, 282 U. S. 19, 24; United States v. Phellis, 257 U. S. 156, 173; Eisner v. Macomber, 252 U. S. 189, 208; Lynch v. Hornby, 247 U. S. 339, 344.
>
> The facts found by the Board of Tax Appeals in this case do not, in our opinion, warrant us in disregarding the separate entity of the corporation. The fact that respondents owned all its stock and were in complete control of it is no reason for disregarding its separate entity. Dalton v. Bowers, supra; Burnet v. Commonwealth Improvement Co., supra; United States v. Phellis, supra; Eisner v. Macomber, supra; Jones v. Helvering, 71 F. (2d) 214, 217.
>
> It is argued by the Commissioner that the transfers by respondents to the corporation were made for the purpose of establishing a deductible loss for income tax purposes. This, if true, is unimportant. A taxpayer may resort to any legal

> method available to him to diminish the amount of his tax liability. Gregory v. Helvering, supra; Superior Oil Co. v. Mississippi, 280 U. S. 390, 395; Bullen v. Wisconsin, 240 U. S. 625, 630; Jones v. Helvering, supra."

To the same effect, see *Edwards Securities Corporation v. Commissioner,* 30 B. T. A. 918, where the converse situation was presented, viz.: the sale of securities by a corporation to its sole stockholder. The loss arising from such sale was held to be deductible for income tax purposes.

It is rather difficult to follow the argument of petitioner on pages 17 to 26 of his brief. Apparently he is contending for the rather startling proposition that Section 23 (e) (2) of the Revenue Act of 1928 and its predecessors were never intended to apply to losses arising from sales by a taxpayer to a solely owned corporation, notwithstanding that the facts clearly show that the corporation was a distinct legal entity, that the sale was bona fide and that there was no repurchase or intention to repurchase.

Petitioner is thus trying to read into the Revenue Act of 1928 a provision which found its way into the Revenue Act of 1934, *but which was not there prior to 1934.* For the first time, Congress enacted in the Revenue Act of 1934 a provision reading as follows:

> "Section 24.
>
> (a) In computing net income no deduction shall in any case be allowed in respect of * * *

(6) loss from sales or exchanges of property directly or indirectly (A) between members of a family, or (B) except in the case of distributions in liquidation, between an individual and a corporation in which such individual owns directly or indirectly more than 50 percentum in value of the outstanding stock * * *"

The House Committee report on the Revenue Act of 1934 in referring to the addition of Section 24 (a) (6), states as follows:

> "Family loss: the bill adds to existing law a paragraph which will deny losses to be taken in the case of sales or exchanges of property between members of a family, or between a shareholder and a corporation in which such shareholder owns a majority of the voting stock. The term 'family' is defined to include brothers and sisters, spouse, ancestors, and lineal descendants.
>
> Experience shows that the practice of creating losses through transactions between members of a family and close corporations has been frequently utilized for avoiding the income tax. It is believed that the proposed change will operate to close this loophole of tax avoidance."

A similar provision is embodied in the Senate Committee report on the 1934 Revenue Act.

If it was the intention of Congress under the Revenue Act preceding that of 1934 not to allow losses from sales between a shareholder and a corporation in which such shareholder owned a majority of the voting stock, then there was no need for the enactment of Section 24 (a) of the 1934 law. Taxing provisions in

a later Act may not be applied to cover omission in an earlier Act. (*Smietanka v. First Trust & Savings Bank,* 257 U. S. 602.) As was pointed out in *Jones v. Helvering,* supra, in answer to a similar contention as that made here by the petitioner:

> "That the result of this was to enable the taxpayers to claim a deductible loss in their income and at the same time by reason of control of the corporation to retain an indirect interest in the bonds, undoubtedly is true, but *it is for the legislature and not the court to find a way of taxing such a transaction.*" (Italics supplied.)

In *Eaton v. White,* 70 Fed. (2d) 449, the Court adverted to *United States v. Merriam,* 263 U. S. 179, wherein the Court said:

> "On behalf of the government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

Continuing, and on page 452, the Court said:

> "These situations only emphasize the advisability and necessity of adhering to the well established rules and principles in dealing with legally established corporate entities and the status and character of corporate shares. *To abandon these moorings, would create difficulties and uncertain-*

ties more objectionable in their results than any seeming inequities which would be eliminated or prevented."

An exactly parallel situation arose under Revenue Acts prior to that of the Revenue Act of 1921. Congress for the first time included a provision in the Revenue Act of 1921 respecting "wash sales", providing that if a person sold a security at a loss and repurchased the same kind of security within thirty days thereafter, in such event the loss could not be taken for income tax purposes. Prior to the Revenue Act of 1921, there was no such provision and both the Commissioner and the Courts permitted a deductible loss to be taken in such circumstances, because of the fact that the statute created no exception to the general rule which recognized that upon the disposition of securities, a loss was realized, irrespective of whether the identical securities were repurchased the very next day.

> *Appeal of Pennsylvania Company for Insurance on Lives and Granting Annuities,* 2 B. T. A. 48 (Acquiesced in by the Commissioner in C. B. IV-2, p. 4);
>
> *Vauclain v. Commissioner,* 16 B. T. A. 1005.

Petitioner in his brief has cited a great many cases wherein the proposition is laid down that the separate entity of a corporation will be disregarded under exceptional circumstances. It would unduly lengthen this brief to analyze each of the cases cited by petitioner. Suffice it to say that the factual situation involved in each of such cases is so utterly different

from that involved herein that the cases have no application. That petitioner recognizes the inapplicability of the holding of those cases to the situation present here is clearly evidenced by his failure to state the facts in any of those cases or to compare them with the facts of the instant case.

Unquestionably, the Court can ignore the distinction between corporation and stockholder where the corporate structure is used as a device by which the stockholder is able to consummate a wrong. If respondent had used his control of the Burlingame Investment Company in order to make a sale to the corporation at a fictitious price and thereby create a fictitious loss, this Court could and would, as it did in the case of *Wishon-Watson Co. v. Commissioner,* 66 Fed. (2d) 52 (Petitioner's Brief, p. 15), hold the sale invalid. Or if respondent had organized the Burlingame Investment Company for the very and sole purpose of selling his securities to it at a loss and had, upon the completion of the sale, effected a dissolution of the corporation, this Court would be justified under the authority of *Gregory v. Helvering,* 293 U. S. 465 (Petitioner's Brief p. 14), in branding the transaction as a mere device for the evasion of income taxes.

The evidence here is undisputed, however, that Burlingame Investment Company was a bona fide corporation organized in 1924 to avoid multiple inheritance taxation, and for the legitimate purpose of dealing in securities, and that it transacted such business continuously from its incorporation in 1924 down to and including the time of the trial of this case in 1934;

that respondent sold the securities in question to the corporation at the market price of such securities at time of sale; that contemporaneously with the sale, the securities were transferred by respondent to the corporation and that continuously thereafter the corporation received and retained all benefits and income from the shares of stock acquired by it; that two of the securities were still held and owned by the corporation at date of trial, and that the third security had been sold by the corporation in the year 1932 on the open market and the proceeds of sale retained exclusively by the corporation; that in accordance with the uniform custom and practice between respondent and the corporation as to all transactions between them, including the payment of dividends, respondent received appropriate credit on the books of account of the corporation and on his separate books of account for the proceeds of sale; and that no agreement existed for the reacquisition by respondent of the securities sold to the corporation, nor did respondent reacquire any of such securities from the corporation.

It is highly significant to note that the only other sale from respondent to the Burlingame Investment Company was made in 1931, at which time respondent sold certain stock to the corporation at a substantial profit and reported this profit and paid a tax thereon in his federal income tax return for that year. (R. 70-72.) Clearly then, this is not the type of case where the sole stockholder of a corporation observes the distinction between himself and the corporation when it serves his own ends and ignores it when he finds it to his advantage to disregard the distinction. To the

contrary, we find that respondent has at all times meticulously treated the corporation as an entity separate and distinct from himself. The same cannot be said for the Commissioner. While entirely satisfied to accept the tax upon the 1931 transaction on the theory that a bona fide sale was made by respondent to the corporation at a profit, he nevertheless would have this Court disregard the corporate entity and hold that no bona fide sale was made in 1930 when the transaction resulted in a loss.

The petitioner admits that "the decision of this Court in *Commissioner v. Eldridge,* 79 F. (2d) 629, was on facts hardly distinguishable from those in the instant case and that the argument advanced on behalf of the Commissioner in the instant case is in all respects identical with that on behalf of the Commissioner in the *Eldridge* case". (Petitioner's Brief p. 26.) He argues, however, that "in the instant case the failure of the Board to make findings on the evidence before it which tended to prove a peculiar intertwining of the personal affairs of the respondent with the affairs of the corporation, and that they were in effect a single identity for all practical purposes, to be treated as such, has been assigned as error"—whereas in the *Eldridge* case, the failure of the Board to make such findings was not assigned as error.

It is difficult to follow the contention of petitioner in this regard. In the first place, the record does not show any request made by petitioner to the Board for any findings of fact. "If there were any specific questions of fact upon which defendant desired findings, it

should have presented them to the Court below". (*General Motors Co. v. Swan Carburetor Co.,* 44 Fed. (2d) 24, C. C. A. 6.) But even though we ignore the failure of the Commissioner to request the desired findings, the Commissioner gains no comfort thereby. The Board found that on December 30, 1930, respondent "unqualifiedly sold his said shares of stock of Standard Oil Company, Transamerica Corporation and Caterpillar Tractor Company to Burlingame Investment Company at the closing market quotations shown upon the San Francisco Stock Exchange on that date" (R. 29); that contemporaneously with the sale the certificates representing said shares of stock were transferred to the corporation; that separate individual books of account were kept by respondent from those of the corporation and appropriate entries were made on the books of account of respondent and the corporation evidencing the sales; that payment of the purchase price was made by appropriate credit on the books of account in line with the consistent practice for recording all transactions between respondent and the corporation, including payment of dividends; and that the sale of the shares of stock was bona fide. (R. 30, 31 and 33.)

If these ultimate findings of fact are supported by substantial evidence, they are conclusive upon an Appellate Court. (*Burnet v. Leininger,* 285 U. S. 136; *Phillips v. Commissioner,* 283 U. S. 589; *Commissioner v. Gerard,* 75 Fed. (2d) 542.)

That there is substantial evidence to support the foregoing findings appears clearly from the statement

of evidence. Aside from that, however, a comparison of the *facts in evidence* in the instant with the *facts found* in the *Eldridge* case shows that there was no greater degree of "intertwining" of personal affairs in one case than the other; the facts, in so far as material, were identical in both cases. Both corporations were "one-man" corporations. In each instance the corporation was a going business concern, the Eldridge Buick Company being engaged in the business of selling automobiles; the Burlingame Investment Company being engaged in the business of investing in securities. In both cases the sales in question were made at the close of the taxable year. In neither case did the vendor receive any cash from the corporation, the purchase price of the securities being credited in each case to the vendor's personal account with the corporation. In both cases the sale was made at the prevailing market price. In neither case was the transaction reflected in the minutes of the corporation.

In the plea which petitioner makes to this Court to disregard the corporate entity of the Burlingame Investment Company, petitioner states:

> "The relationship between the respondent and the corporation was not the usual relationship ordinarily existing between a stockholder and a corporation. The relationship was far closer and more intimate than such a relationship, and of such an unusual nature as to demand that the identity of the corporation as such be disregarded and that it be treated as the respondent's *alter ego.*"
>
> (Petitioner's Brief p. 9.)

Bearing in mind that respondent was the *sole* stockholder of the corporation, it is obvious that there was nothing in the least *unusual* in the relationship between the corporation and himself. Since no one other than respondent had a financial interest in the corporation, it was only *natural* that respondent should be president of the company; that respondent should be the sole person in charge of its active affairs; that he alone should supervise the keeping of the books of the company and that such books should be kept at the joint office of himself and the company; that only respondent should have authority to sign the corporation's checks; that he alone should direct the policy of the corporation. Who, if not the sole stockholder of the corporation, could reasonably be expected to exercise the functions of management and control of the corporate affairs?

The only question involved herein is whether an individual who sells securities owned by him to a corporation of which he is the sole stockholder, without any reservations as to title or future enjoyments, and at the prevailing market price of such securities, is deprived of his right to deduct as a loss in his income tax return, the difference between the cost of the securities to him and the price at which he sold them to the corporation, merely because he is the sole stockholder of the corporation. This question has been determined favorably to respondent by the United States Supreme Court in *Burnet v. Commonwealth Improvement Company,* supra, by this Court in *Commissioner v. Eldridge,* supra, and by every other judi-

cial forum to which it has been presented. The sales involved herein therefore resulted in a deductible loss to respondent.

CONCLUSION.

The decision of the Board of Tax Appeals is correct and should be affirmed.

Dated, San Francisco,
May 8, 1936.

Respectfully submitted,
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